



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

NOV 26 2013.

Neil P. Reiff, Esq.
Sandler, Reiff, Young & Lamb, P.C.
1025 Vermont Avenue NW
Suite 300
Washington, DC 20005

RE: MUR 6684
Gregg for Indiana, *et al.*

Dear Mr. Reiff:

On November 8, 2012, the Federal Election Commission notified your clients, Gregg for Indiana and John Gregg, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint, and information supplied your clients, the Commission, on November 19, 2013, voted to dismiss this matter. The Factual and Legal Analysis, which more fully explains the Commission's decision, is enclosed for your information.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009).

If you have any questions, please contact Kasey Morgenheim, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in dark ink, appearing to read "W. A. Powers", is written over a horizontal line.

William A. Powers
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

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3 **FACTUAL AND LEGAL ANALYSIS**

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5 RESPONDENTS: Gregg for Indiana
6 John Gregg

MUR 6684

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8 I. **GENERATION OF MATTER**

9 This matter was generated based by a Complaint filed with the Federal Election
10 Commission ("Commission") by James R. Holden. See 2 U.S.C. § 437g(a)(1). This matter
11 involves allegations that John Gregg, the 2012 Democratic candidate for governor of Indiana,
12 and Gregg for Indiana, his state campaign committee, violated the Federal Election Campaign
13 Act of 1971, as amended (the "Act"), when they paid for an advertisement that allegedly
14 attacked Mike Pence, Gregg's Republican opponent, and Richard Mourdock, the Republican
15 candidate for U.S. Senate from Indiana. Public communications that "refer to a candidate for
16 federal office and that promote, attack, support, or oppose ('PASO') a candidate for that office,"
17 are considered "federal election activity" — a category of activities required to be paid for with
18 funds subject to the limitations and prohibitions of the Act. See 2 U.S.C. §§ 431(20)(A)(iii),
19 441i(f)(1). Gregg and Gregg for Indiana maintain that they did not violate the Act or
20 Commission regulations because the advertisement does not "attack" or "oppose" Mourdock.
21 The Commission exercises its prosecutorial discretion under *Heckler v. Chaney*, 470 U.S. 821
22 (1985) and dismisses the allegation that Gregg for Indiana and John Gregg violated 2 U.S.C.
23 § 441i(f)(1).

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1 **II. FACTUAL AND LEGAL ANALYSIS**

2 **A. Factual Background**

3 The Complaint asserts that the Respondents violated 2 U.S.C. § 441i(f) and 11 C.F.R.
4 § 300.71 by using non-federal funds to pay for a public communication that “attacked” a federal
5 candidate. Compl. at 1. Unlike the Act, Indiana campaign finance law permits state candidates
6 to accept unlimited individual contributions and contributions of up to \$5,000 from corporate and
7 labor organizations, and therefore funds raised by a state candidate may not be federally
8 permissible. See IND. CODE § 3-9-2-4; see also [http://campaignfinance.in.gov/PublicSite/](http://campaignfinance.in.gov/PublicSite/AboutReporting.aspx)
9 [AboutReporting.aspx](http://campaignfinance.in.gov/PublicSite/AboutReporting.aspx). A review of Gregg for Indiana’s disclosure reports filed with the Indiana
10 Secretary of State confirmed that the Committee accepted corporate contributions, labor
11 organization contributions, and individual contributions in excess of the federal limits. See
12 <http://campaignfinance.in.gov/PublicSite/SearchPages/CommitteeDetail.aspx?OrgId=6174>.

13 The advertisement, entitled “Back and Forth,” began airing on October 30, 2012. Compl.
14 at 2. Public records attached to the Complaint show that Gregg for Indiana paid approximately
15 \$260,000 to air the advertisement through November 6, 2012. Compl., Attach. 2. The
16 advertisement generally provides a series of comparative statements and positions associated
17 with Mourdock, a candidate for federal office, and Pence, Gregg’s gubernatorial opponent:

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Male voiceover:	Richard Mourdock
Video clip of Mourdock:	"I think the Tea Party movement is one of the most exciting political activities in my lifetime."
Male voiceover:	Mike Pence
Video clip of Pence: On-screen news banner: CONGRESSIONAL TEA PARTY CANDIDATES RALLYING IN WASHINGTON TODAY	"Uhh, we'll welcome the Tea Party with open arms."
Male voiceover:	How they'd govern...
Video clip of Mourdock: On-screen news banner: REPUBLICAN REBELLION MOURDOCK: MUST CHANGE THE WAY SENATE LEADERSHIP THINKS	"To me, the highlight of politics, frankly, is to inflict my opinion on someone else."
Video clip of Pence:	"Let's go pick a fight."
Male voiceover:	And even after Mourdock said pregnancy from rape was something...
Video clip of Mourdock: On-screen news banner: INDIANA SENATE DEBATE RICHARD MOURDOCK Indiana, Candidate for U.S. Senate	"...God intended to happen."
Video clip of Pence:	"I support his candidacy for the Senate."
Male voiceover: On-screen photo of John Gregg Caption: JOHN GREGG FOR GOVERNOR PAID FOR BY GREGG FOR INDIANA	You can stop the Tea Party with Governor John Gregg.

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2 Gregg and Gregg for Indiana assert that "Back and Forth" does not "attack" or "oppose"
3 Mourdock and therefore could be paid for with non-federal funds without violating the Act.
4 Resp. at 2. The Response contends that by including Mourdock in the advertisement, the Gregg
5 campaign's goal was to link Pence with Mourdock's views regarding the Tea Party and abortion,
6 which had received significant national media attention in the week before the advertisement
7 began airing. *Id.* The Response asserts that at the time of the advertisement's airing,
8 Mourdock's campaign had fallen significantly behind his opponent, while Pence's response to
9 Mourdock's views had become an issue in the Indiana gubernatorial election. *Id.* at 1-2. The

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1 Response also claims that the content of the advertisement demonstrates it did not “attack” or
2 “oppose” Mourdock. *Id.* at 3. Not only did the advertisement avoid a reference to Mourdock’s
3 candidacy, but, as the Response points out, the final tagline of the advertisement — “You can
4 stop the Tea Party with Governor John Gregg” — only mentions Gregg. *Id.* The Response
5 further asserts that, even if the advertisement presents a close call as to whether it attacks or
6 opposes Mourdock, the Commission should not use the enforcement process to define FASO, a
7 standard for which the Commission has purportedly failed to provide any meaningful guidance.
8 *Id.* at 3-4.

9 **B. Legal Analysis**

10 The sole issue in this matter is whether the “Back and Forth” advertisement attacks or
11 opposes federal candidate Richard Mourdock, such that Gregg for Indiana was required to pay
12 for the advertisement with federal funds.

13 The Act prohibits a candidate for state or local office or an agent of such candidate from
14 spending any funds for public communications that qualify as “federal election activity”
15 (“FEA”), unless the funds are subject to the limitations, prohibitions, and reporting requirements
16 of the Act. 2 U.S.C. § 441i(f)(1); 11 C.F.R. § 300.71. Public communications are considered
17 FEA, and thus regulable under the Act, if they refer to a candidate for federal office and they
18 promote, attack, support, or oppose a candidate for that office, regardless of whether the
19 communication expressly advocates a vote for or against a candidate.¹ 2 U.S.C.
20 § 431(20)(A)(iii). Public communications are not FEA, however, and thus not federally
21 regulated, if they are in connection with an election for a state or local office and refer only to the

¹ The term “public communication” is defined as a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public; or any other form of general public political advertising. 2 U.S.C. § 431(22).

1 candidates for the state or local office; but do not promote, attack, support, or oppose any
2 candidate for federal office. 2 U.S.C. § 441i(f)(2); 11 C.F.R. § 300.72.

3 Congress included the PASO standard in the Bipartisan Campaign Reform Act of 2002
4 ("BCRA"), but neither Congress nor the Commission has defined the concept. BCRA lacked a
5 definition of the PASO terms and the Commission has twice proposed but not adopted
6 definitions for PASO. *See* Prohibited and Excessive Contributions, 67 Fed. Reg. 35,654, 35,681
7 (May 20, 2002) (Notice of Proposed Rulemaking); Coordination, 74 Fed. Reg. 53,893, 53,898-
8 900 (Oct. 21, 2009) (Notice of Proposed Rulemaking).² Despite the lack of a statutory or
9 regulatory definition, the PASO terms themselves "clearly set forth the confines within which
10 potential party speakers must act in order to avoid triggering the provision," and they "provide
11 explicit standards for those who apply them and give the person of ordinary intelligence a
12 reasonable opportunity to know what is prohibited." *McConnell v. FEC*, 540 U.S. 93, 170 n.64
13 (2003).

14 In a series of advisory opinions that applied the PASO standard, the Commission has
15 determined that the mere identification of an individual as a federal candidate in a public
16 communication — such as when a federal candidate endorses a state candidate — does not, by
17 itself, promote, attack, support, or oppose the federal candidate. *See* Advisory Op. 2007-34
18 (Jackson); Advisory Op. 2007-21 (Holt); Advisory Op. 2003-25 (Weinzapfel). In Advisory
19 Opinion 2009-26 (Coulson), the Commission provided guidance on when a federal candidate's
20 state committee or state office account could pay for a communication. The Commission

² Despite the lack of a definition, Congress clearly did not intend the FEA provisions to prohibit "spending non-Federal money to run advertisements that mention that [state candidates] have been endorsed by a Federal candidate or say that they identify with a position of a named Federal candidate, so long as those advertisements do not support, attack, promote or oppose a Federal candidate." Statement of Sen. Feingold, 148 Cong. Rec. S2143 (daily ed. Mar. 20, 2002).

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1 concluded that non-federal funds could be used to pay for a “health care legislative update” letter
2 because the communication was solely related to state officeholder duties, did not solicit any
3 donations, and did not expressly advocate the candidate’s election or the defeat of her opponents.
4 Advisory Op. 2009-26 (Coulson) at 8. The Commission did state, however, that the following
5 phrases could be construed to promote or support Representative Coulson: (1) “I have remained
6 committed to making progress for the residents of this State,” and (2) “I will continue to look for
7 innovative ideas to help improve the healthcare system in Illinois, as well as help improve the
8 lives of those who need our care.” But the Commission determined that non-federal funds could
9 be used to pay for the letter because the adjectives were used to “address Coulson’s past and
10 ongoing legislative actions as a state officeholder” rather than her qualities as a candidate. *Id.* at
11 9.

12 Here, the advertisement at issue focuses on the Indiana gubernatorial election,
13 specifically in opposition to Pence and in support of Gregg. Mourdock’s statements are included
14 in a manner that links Pence to Mourdock’s views and party affiliations, and the statements are
15 offered without commentary. Although Gregg attacks Pence by linking his policy positions with
16 Mourdock, the advertisement’s tagline — “You can stop the Tea Party with Governor John
17 Gregg” — emphasizes the ad’s purpose, to support Gregg.

18 Assuming, *arguendo*, that the advertisement could be interpreted as opposing Mourdock
19 under the PASO standard, the ad focuses on the Indiana gubernatorial election and does not
20 exhort viewers to vote against Mourdock. For these reasons, the Commission exercises its
21 prosecutorial discretion under *Heckler v. Chaney*, 470 U.S. 821 (1985) and dismisses the
22 allegation that Gregg for Indiana and John Gregg violated 2 U.S.C. § 441i(f)(1).

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